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In The
SUPREME COURT OF THE UNITED STATES
October Term 1997

PENNSYLVANIA BOARD OF
PROBATION AND PAROLE,

Petitioner,

v.

KEITH M. SCOTT,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF 33 STATES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

(1) Must a search of a parolee's residence be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of parole?

(2) Whether the exclusionary rule applies to parole revocation proceedings?

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to be expanded, a person in Scott's position might argue that the bargain violated the doctrine as it required him to give up his right to be free from "unreasonable searches and seizures" in order to receive parole. Application of this doctrine would question the validity of the bargain struck between Scott and the probation board.

Amicus submits that this is a difficult, potentially dangerous doctrine that should be confined to the First Amendment. Expansion of this doctrine to the Fourth Amendment would only serve to disrupt established precedent and in the end would strip individuals of the benefit of their bargains. Confining the doctrine to its First Amendment roots, will prevent this disruptive result.[3]

A. First Amendment Roots.

In *Perry* v. *Sindermann*, 408 U. S. 593 (1972), this Court formulated a dictum that should not be allowed to govern the present case. The *Perry* Court was confronted with a claim by a nontenured junior college teacher that his contract was not renewed because he publicly criticized his superiors. This failure to renew was claimed to violate his First Amendment rights. *Id.*, at 595.

In holding that Sindermann's lack of tenure did not bar his First Amendment claim, the *Perry* Court made the following pronouncement:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes

3. This issue has not arisen in the briefing up to this point. *Amicus* CJLF is raising the question and answering it preemptively, because it appears to be the only colorable argument against the validity of the consent and because *amici* are not permitted to file reply briefs. See Supreme Court Rule 37.3(a).

> his constitutionally protected interests—especially, his interest in freedom of speech." *Id.*, at 597.

To the extent that it goes beyond the First Amendment, this statement is dictum. *Perry* was a First Amendment case. Whether the unconstitutional conditions benefits doctrine applied beyond the First Amendment was not an issue. As the present case does not involve an attempt by the government to purchase an individual's First Amendment rights, *Perry* and its ilk do not apply.

The limit of this dictum is seen in *Perry* itself. *Perry* was a First Amendment case dealing with an alleged denial of employment because of the employee's exercise of his free speech rights. As the *Perry* Court recognized, the First Amendment was at the heart of the denial of government benefits doctrine. Thus, the *Perry* doctrine was "especially" concerned with protecting the employee's "interest in freedom of speech." *Ibid.*

The First Amendment limits of *Perry* are further reinforced by the authorities it cites. None of the authorities cited by *Perry* involved denying a government benefit for the exercise of a right outside the First Amendment. Several cases cited by *Perry* did not involve conditioning benefits on giving up some other right, but instead involved denials of benefits that were directly challenged as unconstitutional. See *Shapiro* v. *Thompson*, 394 U. S. 618, 627 (1969) (one-year residence requirement for welfare payments violates equal protection); *Graham* v. *Richardson*, 403 U. S. 365, 376 (1971) (denial of welfare to aliens violates equal protection); *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 894 (1961) (denial of cook's access to military installation did not violate due process). Other cases cited by *Perry* involved loyalty oaths. Some invoked the First Amendment and others the due process "vagueness" doctrine, but all involved a severe impact on speech or association. See *Whitehill* v. *Elkins*, 389 U. S. 54, 59-62 (1967); *Baggett* v. *Bullitt*, 377 U. S. 360, 372 (1964); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 287-288 (1961); *Speiser* v. *Randall*, 357

U. S. 513, 529 (1958); *Wieman* v. *Updegraff*, 344 U. S. 183, 185-186, 191-192 (1952). The other cases involved a variety of First Amendment issues. See *Pickering* v. *Board of Education*, 391 U. S. 563, 574-575 (1968) (speech); *United States* v. *Robel*, 389 U. S. 258, 266-268 (1967) (association); *Keyishian* v. *Board of Regents*, 385 U. S. 589, 608-609 (1967) (association); *Elfbrandt* v. *Russell*, 384 U. S. 11, 16 (1966) (association); *Sherbert* v. *Verner*, 374 U. S. 398, 405-406 (1963) (free exercise of religion); *Torcaso* v. *Watkins*, 367 U. S. 488, 494-496 (1961) (establishment of religion); *Shelton* v. *Tucker*, 364 U. S. 479, 490 (1960) (association); *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100 (1947) (partisan speech and association). See *Perry*, *supra*, 408 U. S., at 597. *Perry* had no support to extend its reach beyond the First Amendment. "It is to the holdings of our cases, rather than their dicta, that we must attend . . . ." *Kokkonen* v. *Guardian Life Ins.*, 511 U. S. 375, 379 (1994).

Other decisions reinforce the First Amendment limits on *Perry*. Although this Court made a similarly expansive statement in *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540 (1983),[4] the only authority it cites to support this claim is *Perry*, a First Amendment case. See *id.*, at 545. Furthermore, *Taxation With Representation* is itself a First Amendment case. See *ibid.* Any implication that *Perry* extends beyond the First Amendment is dictum.

Other decisions demonstrate the First Amendment limits of *Perry* more directly. In *Connick* v. *Myers*, 461 U. S. 138 (1983), this Court traced the development of the rights of public employees. It noted that initially, "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Id.*, at 143. The *Connick* Court then traced the history of the public employee

4. "[T]he government may not deny a benefit to a person because he exercises a constitutional right." 461 U. S., at 545.

rights cases, see *id.*, at 144, and came to the following conclusion. "In *all* of these cases, the precedents in which *Pickering* [v. *Board of Education*, 391 U. S. 563 (1968)] is rooted, the invalidated statutes and actions sought to suppress the rights of public employees *to participate in public affairs*." 461 U. S., at 144-145 (emphasis added). *Perry*, one of *Pickering*'s "progeny," *id.*, at 143, and n. 4, stands for the principle that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Id.*, at 142. This is the proper limit of *Perry*.

More recent pronouncements from this Court have also recognized that the unconstitutional conditions doctrine is an aspect of the First Amendment. "[O]ur modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes on his constitutionally protected . . . freedom of speech . . . .' " *Board of County Commissioners* v. *Umbehr*, 518 U. S. ___, 135 L. Ed. 2d 843, 851, 116 S. Ct. 2342, 2347 (1996) (quoting *Perry*, *supra*, 408 U. S., at 597). Recognizing that the primary purpose of the government employee cases was the protection of a core First Amendment right, "speech on matters of public concern," *Connick*, *supra*, 461 U. S., at 145, the limits of *Perry* are not beyond, but are instead within, the First Amendment.

There are good reasons for these limits. Many constitutional rights outside the First Amendment have been waived in exchange for government benefits. It thus would be impractical and dangerous to now endanger these agreements. So long as it does not suppress ideas, the government may place conditions on "benefits."

> "*Pickering*, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, *government officials*

> *should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary* in the name of the First Amendment." *Id.*, at 146 (emphasis added, footnote omitted).

The Fourth Amendment protections do not deal with the suppression of ideas and therefore should not be subject to the *Perry* dictum. Whatever may be the actual scope of *Perry*, "its antecedents, and its progeny," the doctrine of these decisions does not apply to the present case.

B. The Detrimental Effect on the Bargaining Process.

As the plea bargain is an essential tool of the criminal justice system, see *ante*, at 12-13, so too is consent. Extension of the unconstitutional conditions doctrine would strip our probation and parole systems of this essential tool. Limiting the doctrine to its First Amendment roots will prevent this result and allow the bargaining process to achieve its important goals.

The bargaining process can serve essential functions. See *ante*, at 11-13. In *Ruckelshaus*, for example, the Environmental Protection Agency gained an important tool that helped monitor the pesticide industry in exchange for the economic advantages associated with registration with the agency. *Ruckelshaus* v. *Monsanto*, 467 U. S. 986, 1007 (1984). The unconstitutional conditions doctrine was not permitted to disturb this mutually beneficial bargain or the ones seen in *Bordenkircher* and *Zap*. See *ante*, at 11-13. Limiting the doctrine to the First Amendment helps explain why this Court has upheld such constitutional bargaining when First Amendment rights are not involved.

Furthermore, as Justice Holmes noted in his *Western Union* dissent, the doctrine has logical difficulties. *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, 53 (1910). Justice Holmes explained that "[e]ven in the law the whole generally includes its parts. If the state may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way." *Ibid.* So long as the decision to accept the benefit is voluntary, then an

individual should be able to consent to foregoing a constitutional right in exchange for some government benefit.

If the government is not allowed to condition a benefit, it may withdraw or modify the benefit to the detriment of both the government and the beneficiary. There is already widespread public dissatisfaction with parole and pressure to reduce or eliminate it. See, *e.g.*, Fisher, Changing Pennsylvania's Sentencing Philosophy Through the Elimination of Parole for Violent Offenders, 5 Widener J. Pub. L. 269, 294-295 (1996) (proposal to eliminate parole for violent offenders). Limitation on the ability to search parolees and the consequent reduction in public safety can only add to this pressure. In turn, the government and society would be disadvantaged as our prison system would see increased burdens.

In 1994, 690,159 people were on parole and 2,964,171 were on probation. U. S. Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—1995, p. 540 (1996). The loss of this bargaining process would clearly have an enormous effect on our correctional institutions as the government, in light of this public dissatisfaction, may limit the number of grants of parole and probation. Like the required submission of data in *Ruckelshaus*, warrantless consent searches help monitor those in our parole and probation systems. Supervision of these individuals is an important duty of our probation and parole boards, especially, in light of the research, recognized by this Court, which "suggests that more intensive supervision can reduce recidivism." *Griffin* v. *Wisconsin*, 483 U. S. 868, 875 (1987) (citing Petersilia, Probation and Felony Offenders, 49 Fed. Probation 9 (June 1985)). Without the tools that aid our probation and parole boards in their supervisory tasks, the bargaining process ends. Not only will the government lose the benefits of these types of bargains, the eligible inmates will also lose the benefit of living outside prison walls until their sentences expire. The extension of the unconstitutional conditions doctrine will quite literally "imprison a man in his privileges and call it the Constitution." See *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 280 (1942). Limiting the

doctrine is the only way to prevent this detrimental effect on the bargaining process and truly uphold our Constitution. The unconstitutional conditions doctrine should not apply to this case. The consent is voluntary. That is enough, by itself, to make the search reasonable within the meaning of the Fourth Amendment.

CONCLUSION

The decision of the Pennsylvania Supreme Court should be reversed.

January, 1998

Respectfully submitted,

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STATEMENT OF *AMICI* INTEREST

Ohio and 32 other States write to urge the Court to reverse the decision below and to explain why this case matters not just to Pennsylvania but to her sister States as well.

At stake are two principles of law: (1) whether law enforcement officers need reasonable suspicion to search the residence of a parolee or probationer who has consented to future searches as a condition of early release, and (2) whether in the alternative the exclusionary rule should be extended to parole revocation proceedings. On both points, the States have significant reliance interests. They have long conditioned the early release of prisoners on the waiver of Fourth Amendment rights, and few (if any) State courts have customarily extended the exclusionary rule to parole revocation proceedings.

The States have a considerable interest in the efficient operation of their probation and parole systems. The availability of parole provides a useful tool for rehabilitating certain offenders and for preserving scarce prison space for other offenders who for one reason or another continue to pose a danger to the public. All 50 States and the federal government have some form of early release program. And approximately three-quarters of all adult offenders participate in some form of conditional release while serving a criminal sentence. J. Gobert & N. Cohen: *The Law of Probation and Parole*, § 1.01 (1983).

Parole programs also present unique administrative challenges. Officials must make inherently difficult decisions, balancing the prospect that the rehabilitation of offenders will be furthered by supervised release against the risk that they could exploit their freedom to break the law again. *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 422 U.S. 1, 8-9 (1979). *See also*

Griffin v. Wisconsin, 483 U.S. 868, 873-875 (1987); *Morrisey v. Brewer*, 408 U.S. 471, 483-484 (1972).

Making these decisions more difficult still is the frequency with which they must be made. The number of probationers and parolees has increased by more than two-thirds since 1987, from 1,798,390 to 2,999,287. As a result, the average case load of probation officers has risen from 111 to 301 offenders, a 179% increase, while the average case load of parole officers has risen from 94 to 164, a 74% growth. Criminal Justice Institute, Inc.: *The Corrections Yearbook* (1988), 68, 69, 72, 73; *The Corrections Yearbook* (1997), 140-141,148.

These same officials also have been asked to supervise an increasingly difficult group of criminals. Due in large part to increasingly overcrowded prisons, the percentage of felons in early-release programs has increased from approximately 10% in the 1950's to almost 60% today. C. Lindner & R. Bonn, *Probation Officer Victimization and Field Work Practice: Results of a National Study*, Federal Probation, June 1996, 16; Bureau of Justice Statistics, U.S. Dep't of Justice, T. Bonczar, *Characteristics of Adults on Probation*, Dec. 1997, 1, 3. Plus, more and more offenders with drug abuse, mental health needs and other problems are being given early release, many of whom require significant resources to supervise. Lindner & Bonn, *supra*; M. Bork, *Five Year Review of United States Probation Data, 1990-1994*, Federal Probation, December 1995, 27, 29; Bonczar, *supra* at 2; Lindner, *supra* at 17; J. Denzlinger & D. Miller, *The Federal Probation Officer: Life Before and After Guideline Sentencing*, Federal Probation, Dec. 1991, 49.

Probation and parole agencies have tried to meet these challenges in a variety of ways. As an initial matter, they have increased standards of professionalism. Accrediting

requirements and codes of ethics have been established at the same time that educational prerequisites and in-service training have been increased. R. Lawrence, *Professionals or Judicial Civil Servants*, Federal Probation, Sept. 1994, 14; American Correctional Association: *Standards for Adult Probation and Parole Field Services*, (2d ed, 1981, supplemented 1996). For example, a four-year degree is now a minimum requirement for probation and parole officers and many agencies require a Master's Degree. R. Lawrence, *supra*, at 14. States also require an average of 234 hours of specialized training before a new officer can undertake his or her duties and an average of 41 hours of continuing education each year thereafter. Criminal Justice Institute: *The Corrections Yearbook 1997*, 177. These standards have become so well established as to be a requirement for accreditation. *Standards for Adult Probation*, Nos. 2-3041, 2-3060, 2-3060-1, 2-3065, 2-3069, 2-3070.

Notwithstanding these innovations, the most important tools for meeting these diverse challenges continue to be active oversight of offenders' adjustment to release. Only by following a convict's activities outside the prison can the caseworker ensure that the premise of early release -- that the offender no longer poses a threat to public safety -- remains warranted. As one leading commentator on the subject has explained:

> To fulfill these functions, the parole or probation officer needs considerable investigative leeway. While some information can be garnered from discussions with the offender and the offender's friends, associates, employees, and relatives, other data regarding the person's home life and behavior may not be available from these sources. Investigation

> of the offender's home, possessions, and body may also be required. In such situations, parole and probation officers believe that they need to be able to make unannounced home visits and searches. Often this authority is expressly written into the conditions of release. Even absent a search condition, the nature of the caseworker-offender relationship, and the reduced expectation of privacy which comes from being a probationer or parolee, may implicitly permit such searches. In any event, many parole and probation officers think these searches are necessary and often exercise their prerogative to conduct searches.

J. Gobert & N. Cohen, *supra* at § 8.02 (emphasis added, footnotes omitted).

Authority to conduct such searches, in the aftermath of consent given to make them as a condition of early release, has long been allowed under lower court decisions construing the Fourth Amendment. And, to our knowledge, most States follow the practice of requiring consents to search before offering early release. *See* S. Kneafsey, *The Fourth Amendment Rights of Probationers: What Remains After Waiving Their Right To Be Free From Unreasonable Searches and Seizures?* 35 Santa Clara. L. Rev. 1237, 1249 (1995); *see also Owens v. Kelly* 681 F.2d 1362, 1366-1369 (11th Cir. 1982) (collecting cases).

SUMMARY OF ARGUMENT

In suppressing evidence of a parole violation committed by Mr. Scott, the Pennsylvania Supreme Court erred in two respects. It found that the parole officers

needed reasonable suspicion to search his residence when Mr. Scott had previously consented to such searches as a condition of obtaining a discretionary early release. And it compounded the error by extending the exclusionary rule to the administrative setting of parole (and presumably probation) revocation proceedings.

1. The lower court's first conclusion does not rest on an independent and adequate State ground. While some ambiguity exists concerning the State or federal root of the Pennsylvania Supreme Court's analysis -- did the lower court mean to construe the effect of the waiver as a matter of State law or Fourth Amendment law? -- the court nowhere provides the requisite clear statement needed to insulate this component of the decision from federal review. *See Michigan v. Long*, 463 U.S. 1032 (1983).

The States do not violate -- indeed, they respect -- the Fourth Amendment's prohibition against "unreasonable searches and seizures" when they obtain consent to search an individual's residence. They may obtain such consents on a case-by-case basis, *see Schneckloth v. Bustamonte*, 412 U.S. 218 (1972); and they may do so globally, *see Wyman v. James*, 400 U.S. 309 (1971), *Zap v. United States*, 328 U.S. 624 (1946), *vacated on other grounds*, 330 U.S. 800 (1947). And, above all, they may do so in return for extending a discretionary governmental benefit to which future searches are reasonably related. *See, e.g., Wyman*; *Zap*. So long as government does not put the individual in a position in which "one constitutional right should have to be surrendered in order to assert another," *Simmons v. United States*, 390 U.S. 377 (1968), so long in other words as the government does not bend the will of the individual, *see Schneckloth*, it may permissibly extend discretionary benefits on a conditional basis.

Pennsylvania acted well within these restrictions here. At the time Mr Scott signed the consent form to future searches of his residence by parole officials, he was being extended an opportunity to leave a setting in which random searches are already permitted, waiver or not. *See Hudson v. Palmer*, 468 U.S. 517, 529 (1984). Plainly, the consent requirement was reasonable, and the bargain legitimate. The whole point of carefully monitoring those who have not yet served out the full term of their sentence is to ensure that the premise of early release -- that the offender has proceeded far enough down the path of rehabilitations as no longer to pose a threat to public safety -- remains warranted. The State merely placed an eminently sensible restriction on the terms of Mr. Scott's release, one that it was no less entitled to impose than he was entitled to reject. If there is doubt here, it is whether Pennsylvania overprotected Mr. Scott's rights, not whether it violated them. Under a series of decisions that arise in administrative settings that like this one implicate a host of public safety concerns, it would seem that Pennsylvania had every right to engage in this type of limited search of the residence of their parolees with or without their consent. *See Veronia School Dist. 47J v. Alton*, 115 S. Ct. 2386 (1995); *National Treasury Employee Union v. Von Raab*, 489 U.S. 656 (1989); *Camara v. Municipal Court*, 387 U.S. 523 (1967). Yet the Court need not reach that broader issue since Pennsylvania in fact obtained Mr. Scott's consent.

2. Even if the Pennsylvania Supreme Court correctly found a Fourth Amendment violation, it erred in extending the exclusionary rule to the administrative setting of a parole revocation hearing. The "pragmatic" explanation for imposing an exclusionary rule in criminal trials, primarily the goal of deterrence, *Stone v. Powell*, 428 U.S. 465, 488 (1976), does not carry over to the rehabilitative and public-safety considerations that dominate a State's complex

determination whether to allow a law breaker to leave prison early. The Court has never extended the exclusionary rule beyond the criminal trial (and direct appeal), and in point of fact has rejected requests to extend the rule to grand jury proceedings, the impeachment of criminal defendants, administrative proceedings, civil proceedings commenced by another sovereign, and habeas review of State-court criminal convictions.

The rule is a "grudgingly taken medicant" of which "no more should be swallowed than is needed." *United States v. Janis*, 428 U.S. 433, 454 n.29. And no such medicine is needed here. The exclusion of evidence used to show whether the hopeful assumptions about Mr. Scott's rehabilitation remain true (they do not, it turns out) have no meaningful parallel to the question whether wrongfully-obtained evidence may be used to convict an individual in the first instance. It is one thing to use such evidence to overcome the presumption of a citizen's innocence. Yet it is quite another to use it to determine whether the presumptive public-safety risk of allowing a convict's early release continues to be worth taking.

ARGUMENT

I. Searches Of A Parolee's Residence Need Not Be Based On Reasonable Suspicion When The Parolee Has Consented To Them As A Condition Of Early Release.

As incorporated through the Fourteenth Amendment, the Fourth Amendment imposes the following limitation on State law enforcement: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In placing this limitation on the States' efforts to enforce their criminal laws, the provision does not prevent citizens from consenting on a case-by-case basis to searches of their residence or from consenting globally to all searches of their residence. A contrary view misapprehends the nature of the individual rights created by the Fourth Amendment.

A. States May Condition The Allocation Of Discretionary Government Benefits On The Waiver Of Fourth Amendment Rights.

The Constitution nowhere prohibits States from placing conditions on the receipt of government benefits, and nowhere prohibits government from requiring individuals to waive constitutional rights in order to receive those benefits. Because "not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid," *Corbitt v. New Jersey*, 439 U.S. 212, 218 (1978), the Constitution only prohibits the States from directly violating those rights or indirectly doing so by placing improper sanctions on those who exercise them.

By its terms the Fourth Amendment empowers individuals, not society at large. *See Alderman v. United States*, 394 U.S. 165, 174 (1969). It thus gives citizens the right freely to protest government searches as well as the right freely to authorize them. The guiding principle is a libertarian one -- that the individual's consent must be voluntary, not coerced by illicit governmental pressure or coercion. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

Several decisions of the Court define the contours of government procedures that improperly induce the waiver of criminal procedure rights and those that do not, all in the context of consents obtained in return for government benefits. At one extreme lies *Simmons v. United States*, 390 U.S. 377 (1968). After being arrested for trying to rob a local bank, the defendant moved to suppress evidence of the contents of a suitcase found at the scene of the crime. In order to do so under then-existing law, the defendant had to admit ownership of the suitcase. *See Jones v. United States*, 362 U.S. 257 (1960), *over'd in part*, *Rakas v. Illinois*, 439 U.S. 128 (1978), *over'd in part*, *United States v. Salvucci*, 448 U.S. 83, 84 (1980). This requirement created a "dilemma" for the individual because the government intended to use all pertinent suppression testimony against him at trial. 390 U.S. at 391. Reasoning that a "defendant who wishes to establish standing [to invoke his Fourth Amendment rights] must do so at the risk that the words which he utters may later be used to incriminate him," *id.* at 393, the Court found "it intolerable that one constitutional right should have to be surrendered in order to assert another," *id.* at 394. Far from allowing the individual freely to decide when to waive his Fourth (or Fifth) Amendment rights, this tug of war between constitutional rights was anything but voluntary. The government risks coercion, *Simmons* teaches, when it forces the individual to waive one constitutional right in order to assert another.

Other cases stem from governmental conduct that steers clear of this type of coercion. At issue in *Zap v. United States*, 328 U.S. 624 (1946), *vacated on other grounds*, 330 U.S. 800 (1947), was whether the United States could condition the receipt of a contract on consent to future searches. In accepting a contract to conduct test flights, the defendant agreed that the "'accounts and records of the contractor shall be open at all times to the

Government.'" *Id.* at 627 (quoting the contract). At that time, federal law also provided that such contractors had to submit their books to governmental searches. *Id.* at 626-27 & n.2. In accordance with this waiver and with the relevant statutes, the government searched the defendant's offices and seized an incriminating check. While there was some debate over whether the waiver permitted the government to seize the check, all agreed that the defendant had waived any Fourth Amendment expectation of privacy concerning the search. *See id.* at 628 ("he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts"); *id.* at 632 ("I agree that the government had authority, as a result of its contract with the petitioner and the relevant statutes, to inspect the petitioner's books and records") (Frankfurter, J., dissenting, joined by Murphy, J., and Rutledge, J.). In the end the Court upheld the warrantless and suspicionless search.

Wyman v. Jones, 400 U.S. 309 (1971), likewise rejected a claim that the government penalizes Fourth Amendment rights when it conditions acceptance of Aid to Families with Dependent Children on the recipient's submission to warrantless and suspicionless searches. Recognizing the individual's initial option to accept or refuse the benefits, the Court found no coercive action by the government. The beneficiary remained free to choose between forgoing benefits and preserving the privacy of her home, or accepting the benefits and consenting to the searches. *Id.* at 317-18. In contrast to the facts in *Simmons*, the government had not set up one constitutional right against another. It had merely placed a condition on a government benefit, one that it was no less entitled to impose than the individual was entitled to reject.

Outside the context of the Fourth Amendment, the Court regularly permits individuals to waive criminal procedure rights that the United States Constitution gives them in return for certain government benefits. Indeed, much of the criminal law involves instances in which the defendant must make a difficult choice between pursuing one line of factual development over another or advancing one legal right over another. Yet, in case after case, the Court has permitted individuals -- the ultimate beneficiaries of these rights -- to bargain them away for desired government benefits or perceived advantages. *See Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (the prosecutor may present "the defendant with the unpleasant alternative of forgoing trial or facing charges on which he was plainly subject to prosecution"); *Baxter v. Palmigiano*, 425 U.S. 308 (1975) (permitting State to require inmates to choose between (1) waiving their Fifth Amendment privilege to testify at a disciplinary hearing or (2) remaining silent and having an adverse inference drawn from their silence); *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973) (prosecutor may encourage guilty plea even though it requires waiver of jury trial right); *McGautha v. California*, 402 U.S. 183, 213 (1971) (even though "a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the right involved"). *See also South Dakota v. Dole*, 483 U.S. 203, 210 (1987); *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 143-144 (1947). Similar issues exist in *Ohio Adult Parole Authority v. Woodard*, No. 96-1769.

As these cases make clear, the Constitution in general and the Fourth Amendment in particular do not forbid individuals from opting to waive constitutional rights in

return for government benefits. Only when the government "'benefit to be gained is that afforded by another provision of the Bill of Rights," as it was in *Simmons*, 390 U.S. at 394, or when the government pressure rises to the level of coercion, does a Fourth Amendment violation occur.

B. Pennsylvania Acted Well Within These Requirements In Conditioning Mr. Scott's Parole On Consent To Future Searches Of His Residence By Parole Officers.

Pennsylvania complied with these requirements in full. The State's discovery of evidence of a parole violation during a suspicionless search of Mr. Scott's residence therefore should be admissible at his parole revocation hearing.

1. The Nature Of The Lower Court Decision.

On April 2, 1982, Mr. Scott received a 10 to 20 year prison term for third degree murder. After serving 10 years of his term, the Pennsylvania Department of Corrections released him on parole subject to several enumerated conditions. Among other things, he signed a document entitled "Conditions Governing Parole/Reparole," which provided in part:

> I expressly consent to the search of my person, property and residence, without a warrant by agents of the Pennsylvania Board of Probation and Parole. Any items, in [sic] the possession of which constitutes a violation

> of parole/reparole shall be subject to seizure, and may be used as evidence in the parole revocation process.

Pet. App. 2a; *id.* at 30a n.3.

Despite the clear language of the consent form and despite Mr. Scott's voluntary signature to it, the Pennsylvania Supreme Court held that the form did not allow parole officials to conduct a suspicionless search of his residence. Relying on one of its earlier decisions, the court reasoned as follows:

> "[T]he parolee's signing of a parole agreement giving his parole officer permission to conduct a warrantless search does not mean either that the parole officer can conduct a search at any time and for any reason or that the parolee relinquishes his Fourth Amendment right to be free from unreasonable searches. Rather, the parolee's signature acts as acknowledgement that the parole officer has a right to conduct reasonable searches of his residence listed on the parole agreement without a warrant. . . . [A] search will be deemed reasonable if the totality of the evidence demonstrates: (1) that the parole officer had a reasonable suspicion that the parolee had committed a parole violation, and (2) that the search was reasonably related to the parole officer's duty."

Pet. App. 9a-10a (quoting *Commonwealth v. Williams*, 692 A.2d 1031, 1036 (1997)).

2. No Independent And Adequate State Ground Exists.

Before addressing the merits of this analysis, it bears acknowledging a potential independent and adequate State ground. Two plausible readings of this portion of the decision exist. The first is that the court was construing the language of the consent form from the perspective of its drafters -- that as a matter of State law they meant the condition to require only the waiver of warrantless searches, not suspicionless ones. The second looks at the consent form from the perspective of its reader (the parolee) -- that as a matter of Fourth Amendment law the language of the form waived only the right to oppose warrantless searches, not suspicionless ones. The one reflects the meaning of the words to the drafter; the other reflects the meaning of the words to the individual. The former would present an independent and adequate State ground, because the State court retains final authority to construe the meaning of Pennsylvania's legislative and administrative acts. The latter would not, because this Court has final authority to determine when and to what extent an individual has waived rights under the United States Constitution.

Because both readings are plausible and because the Pennsylvania Supreme Court did not provide a clear statement that it was independently relying on State law to make this decision, the default rule applies. Under *Michigan v. Long*, 463 U.S. 1032 (1983), the absence of clear direction means that this component of the decision rests on federal grounds and may be reviewed by the Court. *See also Ohio v. Robinette* 117 S. Ct. 417 (1996).

3. The Lower Court Erred.

Turning to the merits, the lower court misconstrued the Fourth Amendment as well as several pertinent decisions of this Court interpreting it. States are fully permitted to condition early release on a parolee's consent to suspicionless searches for purposes of ferreting out violations of State parole requirements. Because inmates do not have a constitutional right to avoid lawful incarceration, *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), conditioning early release on a waiver of Fourth Amendment rights does not place Mr. Scott in the "intolerable" position in which "one constitutional right should have to be surrendered in order to assert another," *Simmons*, 390 U.S. at 394.

Recognizing the unique status of parolees, the Court has previously acknowledged the permissibility of treating parolees differently from other individuals.

> To accomplish the purpose of parole, those who are allowed to leave prison early are subjected to specified conditions for the duration of their terms. These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen.
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> * * *
>
> [W]e find that the State's interests are several. The State has found the parolee guilty of a crime against the people. That finding justifies imposing extensive restrictions on the individual's liberty.

Morrissey, 408 U.S. 471, 478, 483 (1972) (emphasis added). *See also Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987).

Nor on this record did coercion of any kind occur. Just as states have no obligation to forgo full imposition of a lawfully- imposed sentence, offenders in Pennsylvania have no obligation to accept the terms of early release. One national study indicates that up to one third of inmates reject early release in view of the difficult conditions placed on it. J. Petersilia, *When Probation Becomes More Dreaded Than Prison,* Federal Probation, March 1990, 23. Under these circumstances, it cannot tenably be argued that the State has engaged in coercion masquerading as choice. Indeed, the choice the State offered Mr. Scott presents far less pressure than the difficult choices the Court has allowed governments to present to other inmates, criminal suspects and criminal defendants. *See McGautha v. California*, 402 U.S. 183, 213 (1971); *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978); *Chaffin v. Stynchombe*, 412 U.S. 17, 31 (1973).

The Fourth Amendment likewise permits individuals to consent to searches on an instance-by-instance basis as well as with respect to all future searches. As a matter of logic and precedent, nothing in the provision requires individuals to provide their consent one search at a time. The guarantee equally allows retail and wholesale consents to search.

Neither is it appropriate to discount the assortment of reasons why a prisoner would waive such rights. In addition to obtaining early release, prisoners may agree to such a condition because they have no intention (at the time) of committing a parole violation or, better yet, prefer the threat of unannounced searches as an inducement to follow parole guidelines. Many citizens want to comply with the law, and for some it may be as liberating to let the truth be known as

it is to hide the truth in the interest of staying out of jail. Yet such moral pressures, all attributable to the individual and not the State, do not show the kind of governmental coercion that undermines a Fourth Amendment waiver. *See Schneckloth, supra*; *cf. Colorado v. Connelly*, 479 U.S. 157, 170 (1986) ("the Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion'") (quoting *Oregon v. Elstad*, 470 U.S. 298, 305 (1985)); *United States v. Washington*, 431 U.S. 181, 187 (1977); *Minnick v. Mississippi*, 498 U.S. 146, 167 (1990) (Scalia, J., dissenting).

A decision making such time-respected choices unconstitutional, moreover, would threaten the basic underpinnings, and hence the continued viability, of probation and parole. Restrictive conditions are an essential tool for making sure that probationers and parolees hew to the path of rehabilitation. What States will be willing to shorten criminal sentences without being able to provide the utmost assurance to their citizens that the parolees' rehabilitative progress is being closely monitored? Indeed, without such conditions, it is no exaggeration to conclude that the availability of those programs would be severely restricted.

Nor can there be any doubt that Mr. Scott consented to the search conducted here. He agreed as a condition of early release that parole officers could conduct a search of his residence without a warrant. The requirement of a warrant has long been deemed, and therefore fairly perceived, as the essence of the privacy right established by the Fourth Amendment. *See Steagald v. United States*, 451 U.S. 204, 214 n.7 (1981) (citing *Payton v. New York*, 445 U.S. 573, 602-03 (1980)). By waiving the right to insist on a warrant before officers searched his residence, Pet. App.

2a, Mr. Scott clearly waived the right to insist on any level of suspicion (customarily defined by the existence of a warrant) before officers searched his residence.

The State's authority to require consent to such searches, it bears adding, does not make parolees complete strangers to the protections offered by the Fourth Amendment. The consent requirement, all agree, must itself still be reasonable. *See Griffin, supra*; *O'Lone v. Shabazz*, 482 U.S. 342, 349 (prison regulations allegedly infringing constitutional rights are themselves constitutional so long as they are "reasonably related to legitimate penological interests") (internal quotation omitted). Thus, in spite of the consent form filed by Mr. Scott, the parole officers' search had to be reasonable in nature and duration, as well as connected to legitimate parole considerations, even though the search itself no longer required reasonable suspicion. Plainly, the State followed these requirements here. For like reasons, it is as appropriate to impose such waivers through consent forms as through State statutes or regulations. *See Griffin, supra*; *Zap, supra*.

A final word deserves consideration. In our view, the harder question in this case is whether Pennsylvania overprotected Mr. Scott's rights, not whether it violated them. Several decisions from the Court suggest that in view of the special needs of State parole programs, Pennsylvania could have engaged in such suspicionless searches even without Mr. Scott's consent. *See Veronia School Dist. 47J v. Alton*, 115 S. Ct. 2386 (1995); *National Treasury Employee Union v. Von Raab*, 489 U.S. 656, 674-75 (1989); *Skinner v. Railway Labor Executive Assoc.*, 489 U.S. 602, 619 (1989); *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967). Just as the Court has permitted random searches of prison cells, *see Hudson v. Palmer*, 468 U.S. 517, 529 (1984), so too it has permitted such seaches in a wide range

of administrative settings that present special safety considerations to the government and diminished privacy expectations for the individual. Under these cases, it would seem to follow that a parolee, no less than those "who choose to participate in a closely regulated industry," "have reason to expect intrusions upon normal rights and privileges, including privacy." *Veronia*, 115 S. Ct. at 2393. Here, however, Pennsylvania went further. It sought -- and obtained -- consent to search. The question whether the State had to do so need not be addressed.

II. The Exclusionary Rule Does Not Apply To -- And Should Not Be Expanded To Apply To -- Probation and Parole Revocation Proceedings.

Even if the Court concludes that Pennsylvania violated Mr. Scott's Fourth Amendment rights, it still should reverse the lower court decision. The Pennsylvania Supreme Court erred in extending the exclusionary rule to this setting.

A. The Court Has Applied The Exclusionary Rule Only In The Context Of The Criminal Trial And Direct Review.

The language of the Fourth Amendment does not compel the exclusion of evidence obtained in violation of its requirements, and thus "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." *United States v. Leon*, 468 U.S. 897, 906 (1980) (citing *Stone v. Powell*, 428 U.S. 465, 486 (1976)). The exclusionary rule, instead, "was a judicially created means of effectuating the rights secured by the Fourth Amendment" in discrete settings, *Powell*, 428 U.S. at 482, a rule that did not apply to the federal

government until 1914, *see Weeks v. United States*, 232 U.S. 383 (1914), and one that did not apply to the States until 1961, *see Mapp v. Ohio*, 367 U.S. 643 (1961).

"The primary justification for the exclusionary rule" is "deterrence" -- to discourage "police conduct that violates Fourth Amendment rights." *Powell*, 428 U.S. at 486. *See Calandra*, 414 U.S. at 348 ("the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect"). Because any "[r]eparation comes too late" to protect the invasion of privacy that accompanies a Fourth Amendment violation, *Linkletter v. Walker*, 381 U.S. 618, 637 (1965), the exclusionary rule is not a "personal constitutional right . . . calculated to redress" the injury to the victim of the invalid search or seizure, *Powell*, 428 U.S. at 486. Rather, it creates a disincentive to violate the provision by suppressing evidence obtained in disregard of its terms.

At the same time, the Court has recognized that the "policies behind the exclusionary rule" are relative, "not absolute." *Powell*, 428 U.S. at 488. The benefits of deterrence, the Court has made clear, do not invariably outweigh "the public interest in determination of truth at trial" or the costs of suppressing pertinent evidence of administrative misconduct. Accordingly, "application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Calandra*, 414 U.S. at 348. Thus far, the Court has generally restricted application of the exclusionary rule to the criminal trial and direct review. *See Mapp v. Ohio*. It has declined to extend the rule to grand jury proceedings, *see United States v. Calandra*, 414 U.S. 338, to the impeachment of criminal defendants, *Walder v. United States*, 347 U.S. 62 (1954), to administrative proceedings, *see Immigration and Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032

(1984), to civil proceedings commenced by another sovereign, *see United States v. Janis*, 428 U.S. 433 (1976), and to federal habeas review of State-court criminal convictions, *see Stone v. Powell*, 428 U.S. 465 (1976).

B. The Exclusionary Rule Should Not Be Extended To Parole Revocation Proceedings.

Conceived in a spirit of judicial "pragmati[sm]," *Powell* 428 U.S. at 488, the exclusionary rule thus has been extended only to those areas where the benefits of deterrence outweigh the considerable costs of suppressing relevant evidence. Yet such cost-benefit balancing, simply put, does not favor extending the rule to parole revocation proceedings.

First, the criminal trials covered by *Mapp* differ in kind from the parole revocation proceedings covered here. Unlike criminal trials, revocation hearings do not focus on the guilt or innocence of an individual concerning a past event. They consider how to rehabilitate offenders and how to ensure that the public does not suffer from premature releases of still-dangerous prisoners. *Gagnon v. Scarpelli*, 416 U.S. 778, 783-791 (1973). Indeed, most proceedings do not even result in reincarceration, confirming the non-punitive nature of the hearing. Bureau of Justice Statistics, U.S. Dept. of Justice, T. Bonczar, *Special Report Characteristics on Adults on Probation 1995*, Special Report, Dec. 1997, at 10 (noting that incarceration occurs in only 29% of revocation proceedings); National Institute of Corrections, U.S. Dept. of Justice, *Status Report on Parole, 1995: Results of An NIC Survey* (Nov. 1995) at 8-9 and table 16 (outlining alternatives to reincarceration).

Nor do revocation proceedings have the same adversarial nature that criminal trials do. The unique nature

of the issues involved -- rehabilitation and public safety -- require a freer flow of information and more flexible procedures than a criminal trial allows. *Gagnon*, 411 U.S. at 782-790. As the Court has observed in concluding that information may be considered in revocation proceedings that is not admissible in criminal trials:

> We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry, the process should be flexible enough to consider evidence . . . that would not be admissible in any adversary criminal trial.

Morrissey v. Brewer, 408 U.S. 471, 489 (1972); *see also Lopez-Mendoza*, 468 U.S. at 1048-1049. In the end, little symmetry exists between a criminal trial's focus on the guilt or innocence of an individual and a revocation hearing's focus on public safety, rehabilitation and the prevention of future harm. The revocation hearing more closely parallels administrative hearings, to which the exclusionary rule does not apply, *see Lopez-Mendoza*, 468 U.S. at 1038-39, than criminal trials, to which the rule does apply, *see Mapp*.

Second, the policy of deterring future Fourth Amendment violations, the "primary justification" for the exclusionary rule, *Stone v. Powell*, 428 U.S. at 486, does not advance the lower court's decision. Neither respondent nor the lower courts have identified any pattern and practice of violations of parolees' Fourth Amendment rights, or for that matter any empirical evidence establishing that application of the exclusionary rule in this setting would in fact deter Fourth Amendment violations.

Nor is it likely that such a deterrent effect could be shown. Police officers and parole officials operate under very different sets of institutional incentives. The police try to obtain criminal convictions. Parole officials try to move rehabilitated convicts out of overcrowded (and costly) prisons and back into society. The former succeeds by winning criminal trials; the latter succeeds by rehabilitating convicts and getting them out of jail. *See Morrissey*, 408 U.S. at 483-484; R. Prus & J. Stratton, *Parole Revocation Decisionmaking: Private Typings and Official Designations*, Federal Probation, March 1976, 48, 50-51.

What is more, State parole officials already have strong incentives for respecting the guarantees of the Fourth Amendment. All State officials, of course, have a duty to obey the Constitution, one that this Court's precedents presume they will follow. *See Agostini v. Felton*, 117 S. Ct. 1997, 2010-2011 (1997). Some States, moreover, already have exclusionary rules applicable to revocation proceedings under State law, *see, e.g., State v. Marquart*, 945 P.2d 1027 (N.M. App. 1997); *State ex rel. Juvenile Dept. of Multnomah County v. Rogers*, 836 P.2d 127 (Or. 1992); *State v. Lapman*, 724 P.2d 1092 (Wash. App. 1986), which themselves limit the need for federalizing this area, *Janis*, 428 U.S. at 445 n.14. Empirical studies also suggest that corrections officials respond to findings of improper conduct by changing offending policies and practices. C. McCoy: *The Impact of Section 1983 Litigation on Policy Making In Corrections*, Federal Probation, Dec. 1981, 17.

Improper revocations also would undermine the institutional interests of probation and parole agencies. On the most fundamental level, unwarranted revocations would impede one of the core administrative functions of these agencies, alleviating prison and jail overcrowding. The major professional organizations and accrediting agencies

governing the field also require that agencies strive to observe offenders' rights. American Correctional Association: *Standards for Adult Probation and Parole Field Services*, Standard 2-3160 (2d Ed. 1981) ("Searches should comply with legal requirements"); American Probation and Parole Association: *Code of Ethics* at ¶¶ 2, 3. Abuse of the revocation process would violate those standards, risking the agencies' accreditation and professional standing.

Individual parole officers themselves have strong personal incentives to avoid wrongful revocations. Most officers view revocations as an indication that they have failed and most recognize that initiating too many revocation proceedings may adversely affect their professional standing. R. Prus & J. Stratton: *supra* at 50-51. Similarly, probation and parole officers have become increasingly concerned about the potential for individual tort liability. Prus & Stratton, *supra* at 51.

Ultimately, the Court has refused to presume that expansion of the rule beyond the criminal trial setting will deter misconduct and has required "convincing indication[s]" that any proposed expansion will effectively supplement existing deterrents. *Lopez-Mendoza*, 468 U.S. at 1046. Instead, it has looked for proof to justify any proposed expansion and has characterized the rule as a "grudgingly taken medicant" of which "no more should be swallowed than is needed." *Janis*, 428 U.S. at 454, n.29. Respondent has not shown that any such strong medicine is needed here.

Third, extension of the rule will hamstring the effective operation of parole programs and cause a host of "secondary costs that flow from the less accurate or more cumbersome adjudication" following application of the rule. *Lopez-Mendoza*, 468 U.S. at 1041. "Applying the

exclusionary rule in proceedings that are intended not to punish past transgressions but to prevent their continuances or renewal would require [decisionmakers] to close their eyes to ongoing violations of the law." *Id.* at 1046. Extension of the rule would deprive officials of relevant information necessary to achieve the bookend objectives of a responsible parole system -- rehabilitation and protection of the public.

C. Nor Should The Exclusionary Rule Apply When The Officer Knows That The Resident Is A Parolee.

The lower court agreed with much of the above analysis. Yet it still concluded that the exclusionary rule should apply under some circumstances, namely whenever the investigating officer knows or has reason to know the status of the parolee at the time of the search. In the lower court's view, when the investigator knows the status of the parolee and "there is no reasonable suspicion of a parole violation, there is a need to apply the exclusionary rule to the revocation process since otherwise there is nothing to deter a parole agent from conducting an illegal search or engaging in other illegal activity to obtain evidence." Pet. App. 15a. This is wrong on several fronts.

The continued existence of the exclusionary rule for criminal proceedings already acts as a strong deterrent against unconstitutional searches of parolees, whether the police know their status or not. An officer that suspects criminal activity is afoot is as apt to be interested in getting an arrest (and conviction) as a parole revocation. Only the oddest of fact patterns would tempt an officer to sacrifice a potential criminal conviction in order to obtain a parole revocation.

For like reasons, a knowledge-based approach does not in fact offer any additional deterrence against unauthorized searches. A police officer who conducts an unauthorized search violates the Constitution in one of two ways: Either the violation was inadvertent (*i.e.*, negligent), or it was intentional. When negligence is the source, no extra deterrence follows from a knowledge-based limitation. The whole point of such a limitation is to prevent intentional, not negligent, unconstitutional searches -- in other words, to prevent just those searches that occur because the officers know the individuals to be parolees and think they can get away with the violations because the evidence may be used in a parole revocation proceeding. A knowledge-based limitation simply will not deter inadvertent violations; it just will exclude pertinent evidence.

No doubt, the same cannot be said for intentional violations. A knowledge-based limitation might well deter such transgressions, but it still offers no more deterrence than already exists. When police officers intentionally violate a citizen's constitutional rights, the exclusionary rule is the least of their worries. Such conduct exposes officials to individual-liability claims, internal discipline and worse. These risks to the officer's welfare provide all the deterrence anyone needs. A contrary view, moreover, posits a law enforcement officer more concerned about the potential exclusion of evidence than the potential for a money-damages action and self-advancement. While it might be said that such concern for the public welfare remains the hallmark of being a police officer, it hardly applies to the malevolent parole officer that the lower court conjured in addressing this issue. That court's contrary conclusion should be reversed.

CONCLUSION

For the foregoing reasons, we respectfully urge the Court to reverse the decision below.

Respectfully submitted,

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